

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HENRY DIXON,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 208349

Oakland Circuit Court

LC No. 94-130880-FC

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and was sentenced to two concurrent terms of twenty-five to fifty years' imprisonment. He appeals as of right. We affirm.

Defendant was convicted of sexually assaulting the twelve-year-old daughter of his live-in girlfriend. The assaults allegedly occurred in October and December 1993.

Defendant first argues that he was denied his right to a speedy trial under US Const, Am VI and Const 1963, art 1, § 20. See also MCL 768.1; MSA 28.1024; *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We disagree.

In determining whether a defendant has been denied his right to a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972); *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978); *Gilmore, supra* at 459.

It is undisputed that there was a forty-one month period of delay in this case, which is thus "presumptively prejudicial" to defendant and shifts the burden of proving lack of prejudice to plaintiff. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993). There is disagreement with regard to the reasons for the delay. While there is apparently no dispute that part of the delay resulted from the stipulated adjournment of trial on several occasions, amounting to about eight months' delay in

total, and that part of the delay was attributable to docket congestion and a court error in removing the case from the trial docket, much of the delay was also attributable to a defense motion for discovery of the complainant's psychological records. Because most of the delay involving the receipt of the victim's psychological records appeared to be unexplained, we attribute it to the prosecutor, see *People v Patterson*, 170 Mich App 162, 167; 427 NW2d 601 (1988), remanded 437 Mich 895 (1991), but give it "a neutral tint and only minimal weight." *Gilmore, supra* at 460. It is also apparent from the record that defendant repeatedly asserted his right to a speedy trial, moving five times for dismissal on this basis. Nonetheless, we agree with the trial court's determination that defendant did not suffer any cognizable prejudice from the delay so as to deprive him of his right to a speedy trial.

Because defendant was out on bond throughout the pretrial period, he did not suffer any prejudice from pretrial incarceration. Moreover, contrary to defendant's claim, his mere anxiety over trial is insufficient to show that he suffered a violation of his right to a speedy trial. *Gilmore, supra* at 462. Further, there was no evidence that defendant suffered prejudice because of "lost evidence" or the "unavailability of a key witness." Although defendant claims that he was unable to locate a witness who could have refuted the victim's testimony pertaining to other sexual acts that he allegedly committed against her, the proposed testimony of this witness would not have addressed the circumstances of the charged offenses and, therefore, was unrelated to the determination of defendant's guilt or innocence in this particular case. Accordingly, on balance, we conclude that the trial court did not err in ruling that defendant was not deprived of his right to a speedy trial.

Next, the trial court did not abuse its discretion by precluding defendant from admitting evidence suggesting a prior sexual assault on the victim by an older brother. MCL 750.520j; MSA 28.788(10); *People v Adair*, 452 Mich 473, 484-485; 550 NW2d 505 (1996). The evidence was offered as an alternative explanation for the condition of the victim's hymenal ring. As the trial court observed, however, there was no evidence that the victim's brother had sexually assaulted or abused the victim. Thus, unlike *People v Mikula*, 84 Mich App 108; 269 NW2d 195 (1978) and *People v Haley*, 153 Mich App 400; 395 NW2d 60 (1986), defendant's proffered evidence was not relevant for purposes of showing the origin of the victim's physical condition. Moreover, in this context, any probative value of the proposed testimony of defendant's mother was outweighed by "the inflammatory or prejudicial nature of the rebuttal evidence." *Mikula, supra* at 115.

Next, defendant argues that the trial court erred in allowing the victim to testify regarding other sexual assaults by defendant. Because defendant did not object to this testimony at trial, he must establish plain error that was outcome-determinative or error that falls under the category of cases where prejudice is presumed or reversal is automatic. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Here, defendant has not established plain error in the admission of this testimony. See *People v DerMartex*, 390 Mich 410, 415; 213 NW2d 97 (1973). Further, defendant has not established that defense counsel was ineffective for failing to object to this testimony. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant has not overcome the presumption that counsel's failure to object was a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

Finally, we reject defendant's argument that his sentences are disproportionate under *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The sentences are within the range recommended by the sentencing guidelines, and defendant has failed to present any "unusual circumstances" to overcome the presumption of proportionality. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens